Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor

HIGH COURT (TAIPING) — CIVIL SUIT NO 22-7 OF 1993(T)
ABDUL MALIK ISHAK J
6 SEPTEMBER 1994

Civil Procedure *— Summary judgment — Trespass — Defendants' affidavit-in-reply did not contain supporting exhibits and was untrue — No real or bona fide defence — Rules of the High Court 1980 O 14*

Tort *— Trespass to land — Damages — Construction of buildings and planting of trees on land — No actual loss suffered by landowner — Whether damages claimable*

Words and Phrases *— 'Trespasser'*

The plaintiff alleged that land comprised in HS(D)LM 4277-4311, PT 2053-2007 ('Lot 76') belonged to them whilst the defendants were the owners of Lot 78. The plaintiff also alleged, inter alia, that the defendants had trespassed and constructed buildings on Lot 76 and, consequently, sought damages and costs. The defendants, however, stated that their architect had put up plans for the buildings and had identified the land as Lot 76. The plans were approved by the Majlis Perbandaran Taiping ('MPT') and certificates for occupation were issued. The plaintiff replied that it was not an architect but a registered building draftsman who had drawn up the building plans and that the approval of the plans had been meant for Lot 78 and not Lot 76. The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC').

Held, allowing the plaintiff's application:

(1) The defendants' affidavit-in-reply did not contain any exhibits to support their case and was a blatant exaggeration and untrue. The evidence showed that the land was not surveyed by a qualified surveyor and that it was the first defendant who had pointed out Lot 76 to the registered building draftsman. It also showed that the approval of the building plans was meant for Lot 78.

(2) In law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land. That was a fitting description of the defendants and they had not satisfied the court that there was a fair or reasonable probability of them having a real or bona fide defence.

(3) The plaintiff is entitled to recover damages in trespass even though he has sustained no actual loss. However, damages must be specifically proved and accordingly, it was to be assessed by the senior assistant registrar.

Obiter:

A judge may enter summary judgment where the facts warrant it or where the case is virtually uncontested or uncontestable or where the issues are clear. In considering the plaintiff's application for summary judgment, the court was entitled to consider previous related injunctive orders and contempt proceedings against the defendants.

[Bahasa Malaysia summary

Plaintif mengatakan bahawa tanah yang terkandung di dalam HS(D)LM 4277–4311, PT 2053–2007 ('Lot 76') dipunyai oleh mereka manakala defendan merupakan pemunya Lot 78. Plaintif juga mengatakan, antara lain, bahawa defendan telah mencerobohi dan membina bangunan di atas Lot 76 dan, akibatnya, memohon untuk mendapatkan ganti rugi dan kos. Bagaimanapun, defendan menyatakan bahawa akitek mereka telah melukis pelan untuk bangunan tersebut dan telah mengenal pasti tanah itu sebagai Lot 76. Pelan tersebut telah diluluskan oleh Majlis Perbandaran Taiping ('MPT') dan perakuan penghunian telah dikeluarkan. Plaintif menjawab bahawa pelan itu tidak dilukis oleh seorang akitek tetapi seorang pelukis pelan bangunan berdaftar dan bahawa kelulusan pelan itu telah dimaksudkan untuk Lot 78 dan bukannya Lot 76. Plaintif telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, membenarkan permohonan plaintif:

(1) Afidavit jawapan defendan tidak mengandungi sebarang eksibit untuk menyokong kes mereka dan adalah suatu tokok tambah yang terang-terangan dan tidak benar. Keterangan menunjukkan bahawa tanah itu tidak diukur oleh seorang juruukur yang berkelulusan dan bahawa defendan pertamalah yang telah menunjukkan Lot 76 kepada pelukis pelan bangunan berdaftar itu. Ia juga menunjukkan bahawa kelulusan pelan bangunan itu telah dimaksudkan untuk Lot 78.

(2) Di sisi undang-undang, seorang penceroboh adalah seorang yang memasuki tanah yang dimiliki oleh orang lain secara salah, dan tidak mempunyai hak atau kebenaran untuk berada di atas tanah itu. Gambaran itu sesuai digunakan terhadap defendan dan mereka tidak dapat memuaskan mahkamah bahawa terdapat kemungkinan yang wajar atau agak baik bahawa mereka mempunyai pembelaan yang benar atau bona fide.

(3) Seseorang plaintif di dalam kes pencerobohan berhak mendapat ganti rugi walaupun beliau tidak mengalami kerugian sebenar. Bagaimanapun, ganti rugi mesti dibuktikan secara spesifik dan dengan demikian, ia akan ditaksirkan oleh penolong kanan pendaftar.

Obiter:

Seseorang hakim boleh mencatat penghakiman terus di mana fakta kes itu mewajarkannya atau di mana kes itu hampir-hampir tidak dipertikaikan atau tidak boleh dipertikaikan atau di mana isunya jelas. Apabila mempertimbangkan permohonan plaintif untuk penghakiman terus, mahkamah berhak mempertimbangkan perintah injunksi dan prosiding penghinaan terdahulu yang berkaitan yang dibawa terhadap defendan.]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2178–2296; [1989] Mallal's Digest 504–559; [1990] Mallal's Digest 400–436; [1991] Mallal's Digest 447–496; [1992] Mallal's Digest 363–392; [1993] Mallal's Digest 288–310.

For cases on trespass to land, see 12 *Mallal's Digest* (4th Ed) paras 658–687; [1990] Mallal's Digest 1197; [1991] Mallal's Digest 1972–1974; [1992] Mallal's Digest 1669; [1993] Mallal's Digest 1297.

Cases referred to

Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray [1984] 1 Lloyd's Rep 21 (folld)

Citibank, NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Jacobs v Booth's Distillery Co (1901) 85 LT 262 (refd)

Janaki & Anor v Cheok Chuan Seng & Ors [1973] 2 MLJ 96 (folld)

Ooi York Choo v Lim Song Foundry [1963] MLJ 87 (folld)

Robert Addie & Sons (Collieries) Ltd v Dumbreck [1929] AC 358 (folld)

Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor [1993] 4 CLJ 177 (refd)

Shell-Mex & BP Ltd v Manchester Garages [1971] 1 All ER 841; [1971] 1 WLR 612 (refd)

Zainal Abidin bin Sulaiman & Ors v Hoya Holdings Sdn Bhd [1993] 2 AMR 31:1376 (folld)

Legislation referred to

Rules of the High Court 1980 O 14

A Selvanathan (*Kean Chye & Sivalingam*) for the plaintiff.
Gurbachan Singh (*Bachan & Kartar*) for the defendants.

Abdul Malik Ishak J: This is an application by the plaintiff by way of summons-in-chambers (encl 7) supported by the affidavit of Sanglidevan a/l Sinnathamby (encl 7A) for summary judgment against the defendants in regard to a piece of land comprised in HS(D)LM 4277–4311, PT 2053–2007 (previously known as EMR 1133, Lot 76), Mukim Sungai

Tinggi, in the District of Larut and Matang (hereinafter referred to as 'Lot 76'). It was the plaintiff's case all along that Lot 76 belonged to it whilst the defendants were the owners of Lot 78. It was also the plaintiff's case that the defendants had trespassed and built a bungalow, a factory, planted 56 durian trees, fenced up the area and bolted it, on Lot 76 and, consequently, the plaintiff also sought damages and costs.

Under the law, the plaintiff is entitled to apply straight to the judge for summary judgment without trial under O 14 of the Rules of the High Court 1980 ('the RHC') and the judge is equally empowered and has the jurisdiction to enter and order summary judgment where the facts warrant it or where the cases are virtually uncontested or uncontestable or where the issues are clear. It is pertinent to point out that O 14 of the RHC was intended to put an end to sham defences concocted for the sole purpose of delay and, consequently, causing great loss to the plaintiffs who were endeavouring to enforce their rights under the law (*Jacobs v Booth's Distillery Co* (1901) 85 LT 262, HL; *Citibank, NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282; and *Shell-Mex & BP Ltd v Manchester Garages* [1971] 1 All ER 841; [1971] 1 WLR 612).

In their statements of defence and counterclaim, the defendants stated that their architect had put up the relevant plans for the construction of the buildings and the said architect had identified the land to be at Lot 76; these plans were then submitted to the Majlis Perbandaran Taiping ('MPT') for approvals after obtaining the views of the relevant government agencies like the Jabatan Kerja Raya, Jabatan Pengairan dan Saliran and the Jabatan Kesihatan. Finally, it was stated that the MPT had approved the plans and had issued the certificates for occupation. Unfortunately, no exhibits were annexed by the defendants in their affidavit-in-reply (encl 10A) to support their version as set out in the statements of defence and counterclaim. The affidavit-in-reply (encl 10A) presents a golden opportunity to nail down the plaintiff's application for summary judgment. But alas, it spoke of precious little. On the other hand, the plaintiff in their affidavit-in-reply (encl 11) rebutted that part of the defendants' affidavit-in-reply (encl 10A) in regard to, first, the purported MPT's approval of the building plans submitted by the defendants and, secondly, the purported issuance of the certificates of occupation by the MPT. The plaintiff averred in their affidavit-in-reply (encl 11) that it was not the architect but rather the 'pelukis pelan bangunan berdaftar' that drew the defendants' plans. To back up their allegation, a letter dated 20 April 1993 from Choy Kee Foong, the pelukis pelan bangunan berdaftar, was exhibited. That letter addressed to the plaintiff reads as follow and it contains startling facts adverse to the defendants:

> Per: Maklumat tentang bangunan haram di atas Lot 76 Titi Temerlok, Mukim Sungai Tinggi, Perak Darul Ridzuan, Guaman No 22–7–1993(T), Mahkamah Tinggi, Taiping
>
> Merujuk kepada surat tuan bertarikh 20 April 1993, berkenaan dengan perkara di atas bagi para:

(a) Juruukur tidak dilantik oleh tuan tanah bagi mengukur tanah tersebut. A

(b) Pengesahan Lot 76 telah ditunjukkan oleh Encik Wong Kai Chuan, pemilik Lot 78.

(c) Bangunan yang berada di atas Lot 76 tidak mempunyai sijil kelayakan menduduki yang sah dan saya hanya menjadi sebagai juru pelan ke atas Lot 78 yang tanahnya kosong buat masa ini. B

Kerjasama tuan dalam perkara ini amat dihargai tinggi.

Sekian, terima kasih.

Yang benar
— Tandatangan —
Choy Kee Foong C

This letter shows that the defendants did not employ a qualified surveyor to survey the land before putting up the bungalow and the factory; it was the first defendant who pinpointed Lot 76 to the pelukis pelan bangunan berdaftar; and that the buildings on Lot 76 were without valid certificates of occupation. D

Even the MPT, in a letter dated 13 February 1993 addressed to the plaintiff and marked as exh S12 in support of the affidavit of Sanglidevan a/l Sinnathamby (encl 7A), denied approving the plan for Lot 76 but rather the approval was meant for Lot 78. In another letter dated 22 December 1992, the MPT drew Choy Kee Foong's attention (see exh S12 in encl 7A) to the cancellation of the 'sijil kelayakan menduduki' E as there were no buildings erected on Lot 78 as proposed and that the MPT considered that the development on Lot 76 as unlawful and that legal action would be taken accordingly. This was not a mere threat uttered by the MPT. The MPT meant business and by letter dated 23 December 1992, the President of the MPT sent a notice of demolition F of the buildings on Lot 76 to the plaintiff with copies thereof to the defendants (see exh S6 of encl 1B). I am constrained to say that the defendants' affidavit-in-reply (encl 10A) which exhibited the statements of defence and counterclaim (exh A) was not only a blatant exaggeration but also untrue.

Adopting a different stance, counsel for the defendants, clutching at G straws, argued that the word 'trespass' was never used by the plaintiff in their statement of claim. This meant that the plaintiff was converting the pleadings from one nature to that of another or from one cause of action to that of another. The plaintiff's counsel rebutted this and pointed out that the issue of trespass had been ventilated in an earlier judgment of this H court (see *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1993] 4 CLJ 177); that the word trespass was specifically mentioned in para 6 of the statement of claim (encl 1D); and that there was an application for an injunction to restrain the defendants from entering Lot 76 as prayed for in para 13(d) of the statement of claim (encl 1D). The court order dated 5 March 1993 clearly restrained the defendants by their servants or agents I or otherwise from entering or trespassing upon Lot 76 and to argue that the issue of trespass was never ventilated by the plaintiff in their statement

of claim was indeed mischievous and an exercise in misrepresentation of the factual scenario of the whole case. In para 5 of the statements of defence and counterclaim, the defendants admitted trespassing on Lot 76 since 1987.

Reading the pleadings, one would be able to detect the element of trespass. Who is a trespasser? In law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land. Lord Dunedin in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 at p 371 aptly described a trespasser as one 'who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to'. That would be a fitting description of the defendants.

In considering the plaintiff's application for summary judgment under O 14 of the RHC, I am entitled to consider the injunctive order dated 5 March 1993 and the contempt proceedings which culminated in the court order dated 29 July 1993 wherein the first defendant, who was found to have violated the injunctive order dated 5 March 1993, was cautioned and discharged.

The whole case revolves on trespass. It is a sheer waste of judicial time to proceed for trial as the whole issue can easily be resolved at this juncture. The defendants' counsel argued that the real issue could only be crystallized during the trial proper and, consequently, the application for summary judgment should be dismissed with costs. I beg to disagree. From the pleadings and the affidavits filed therein, one would not only be able to see the wood from the trees but also see the moon in the darkness of the night. It would be an exercise in futility and sheer wastage of judicial time to go for trial. I have looked at the whole situation and have asked myself time and again this vital question whether the defendants have satisfied this court that there is a fair or reasonable probability of the defendants having a real or bona fide defence? (See *Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21.) Unfortunately, the answer is in the negative. I accordingly make an order that the plaintiff is entitled to summary judgment with costs.

General and special damages

The plaintiff sought for these two damages and they were set out in encl 7. The special damages itemized in para 6 of encl 7A were:

(a)	Kos tanah	RM210,000.00
(b)	Penukaran dan pecah lot	
	(i) premium penukaran	RM15,720.40
	(ii) yuran juruukur	RM9,135.00
(c)	Yuran professional	
	(i) yuran akitek	RM8,000.00
	(ii) yuran jurutera	RM10,000.00

(d)	Yuran pelan	
	(i) yuran bangunan pelan	RM3,312.00
	(ii) yuran pelan R & D	RM150.00
(e)	Kos pentadbiran	RM75,000.00
		RM331,317.40

At first blush, it seems that the plaintiff was turning his misfortune into a fortune. But the law is clear. The plaintiff in trespass is entitled even though he has sustained no actual loss, to recover damages. Thus, where the defendants used the plaintiff's land as a means of access to his accretion land owned under a licence without the plaintiff's permission, exemplary damages was awarded to the plaintiff (*Ooi York Choo v Lim Song Foundry* [1963] MLJ 87 and *Janaki & Anor v Cheok Chuan Seng & Ors* [1973] 2 MLJ 96). The plaintiff should not throw these figures at the court and pray for an order in terms. They must specifically prove them (*Zainal Abidin bin Sulaiman & Ors v Hoya Holdings Sdn Bhd* [1993] 2 AMR 31:1376). In the event, in regard to these damages, the proper order would be for the senior assistant registrar to assess them. I accordingly make an order to that effect. The senior assistant registrar should proceed to assess damages on 21 September 1994.

Order accordingly.

Reported by Anne Khoo